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IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 1286

Wisconsin Public Service Corporation,

Petitioner,

vs.

Federal Power Commission,

Respondent.

PETITION OF WISCONSIN PUBLIC SERVICE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD,
Of Counsel.

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PETITION OF WISCONSIN PUBLIC SERVICE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wisconsin Public Service Corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment of that court entered on the 26th day of February, 1945, in the case of Wisconsin Public Service Corporation, petitioner, vs. Federal Power Commission, the docket number of which in said court is 8427. A certified transcript

of the record in the case, including proceedings in said Circuit Court of Appeals, is furnished herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

On July 30, 1943, the Federal Power Commission in proceedings before it ordered petitioner to file an application for a license under the Federal Power Act for the operation and maintenance of Tomahawk Dam on the Wisconsin River in Lincoln County, Wisconsin.

Petitioner filed with the Federal Power Commission on August 26, 1943, an application for rehearing, and said application for rehearing was denied on the 21st day of September, 1943.

Petitioner thereupon and on October 5, 1943, filed with the United States Circuit Court of Appeals for the Seventh Circuit a petition for review of said order of the Federal Power Commission.

The said Circuit Court of Appeals on February 26, 1945, affirmed said order.

JURISDICTION

The bases upon which it is contended that this court has jurisdiction to review the judgment are:

1. The statute provides that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it, with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

2. The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed is February 26, 1945.

3. The statutes under which jurisdiction is invoked are Section 240(a) of the Judicial Code, 28 U.S.C.A. § 347, and Section 313 of the Federal Power Act (16 U.S.C.A., § 825 (l)).

4. The Federal Power Commission in proceedings before it ordered the petitioner to make application for a license under the Federal Power Act to maintain and operate a dam across the Wisconsin River at Tomahawk, Lincoln County, Wisconsin. Upon a petition filed with the United States Circuit Court of Appeals for the Seventh Circuit to review said order of the Federal Power Commission, said Circuit Court of Appeals affirmed the order of the Federal Power Commission.

5. The cases believed to sustain the jurisdiction of the court are:

Forsyth vs. Hammond, 166 U. S. 506;
American Construction Company vs. Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372;
Montana Mining Company, Limited vs. St. Louis Mining and Milling Company, 204 U. S. 204;
Warner vs. New Orleans, 167 U. S. 467.

QUESTIONS PRESENTED

1. Does the Federal Power Commission have jurisdiction and authority to require the licensing of dams in navigable waters in those cases where, as in the instant case, the dam was constructed under a license from a state prior to 1890 when Congress entered the field of regulation?

2. Is not a dam so constructed expressly exempted from the operation of the Federal Power Act by reason of the following language of Section 23(a) thereof:

> "The provisions of this Part shall not be construed as affecting any permit * * * heretofore granted * * * or as affecting any authority heretofore given pursuant to law, * * *."

And do not the words "any permit * * * given pursuant to law, * * *" include a permit granted by a state prior to the time when Congress entered the field of regulation?

3. Does not a proper construction of the Federal Power Act require that, before the Federal Power Commission may order the taking out of a license thereunder, the stream involved shall be "used or suitable for use for the transportation of persons or property in interstate or foreign commerce;" or is the fact that a stream is a navigable water of the United States by reason of a prior use, which use has long since ceased, alone sufficient to give the Federal Power Commission jurisdiction to require a license thereunder? This question is predicated on the premise that the record discloses that the interests of interstate or foreign commerce are not affected by the dam.

4. Is there substantial evidence to support the finding of the Commission that the interests of interstate or foreign commerce would be affected by the dam here involved?

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI

The discretionary power of this court is invoked upon the following grounds:

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law involving the construction of the Federal Power Act in a way probably in conflict with applicable decisions of the Supreme Court of the United States, and in conflict with the intended construction to be placed on the statute, as indicated in the discussion in Congress on the subject of its construction.

2. The Circuit Court of Appeals for the Seventh Circuit has decided a question of federal law of general importance which has not been but should be settled by the Supreme Court of the United States.

3. The final adjudication by this court of the questions involved is desirable, as such questions affect many dams and other structures in navigable waters of the United States which were constructed under state authority prior to the time the Congress entered into the field of regulation.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and to send to the Supreme Court of the United States for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings had in the case above referred to, decided on the 26th day of February, 1945, to the end that said case, together with the judgment and decision therein rendered, may be reviewed and determined by this court as to the questions presented hereby, and that the said decision or judgment may be reversed by this court, and that your petitioner may have such other and further relief in the premises as to this court may seem proper and just.

Respectfully submitted,

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not at the time of printing of this brief been reported. It is reproduced beginning at page 644 of the Record.

Jurisdiction

The grounds for jurisdiction are:

1. The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed is February 26, 1945.

2. The judgment was rendered in a proceeding in the Circuit Court of Appeals for the Seventh Circuit to review an order of the Federal Power Commission, which order required petitioner to apply for a license under the Federal Power Act to maintain a dam in the Wisconsin River. Said Circuit Court of Appeals affirmed the order of the Federal Power Commission.

3. The statutes under which jurisdiction is invoked are Section 240 (a) of the Judicial Code, 28 U.S.C.A., § 347, and Section 313 of the Federal Power Act, 16 U.S.C.A., § 825 (l).

The first of said statutes provides that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon petition of a party to require by certiorari that the cause be certified to the Supreme Court of the United States for determination by it, with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

4. The cases believed to sustain the jurisdiction of the court are:

Forsyth vs. Hammond, 166 U. S. 506;
American Construction Company vs. Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372;
Montana Mining Company, Limited vs. St. Louis Mining and Milling Company, 204 U. S. 204;
Warner vs. New Orleans, 167 U. S. 467.

STATEMENT OF THE CASE

On May 27, 1937, petitioner filed with the Federal Power Commission its Declaration of Intention to reconstruct the dam in the Wisconsin River at Tomahawk, Wisconsin. (R. 595)

On July 30, 1943, the Federal Power Commission rendered its decision and made a determination and order requiring petitioner to file with said Commission an application for a license under the Federal Power Act for the operation and maintenance of said dam. (R. 595-613)

On August 26, 1943, petitioner filed an application for rehearing. (R. 614) Said application was denied on September 21, 1943. (R. 621)

On October 5, 1943, petitioner filed with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit its petition for review of said order of the Federal Power Commission, and a statement of points. (R. 629 to 633) On February 26, 1945, said court affirmed the order of the Commission. (R. 644)

On February 26, 1887, the Legislature of Wisconsin, by Ch. 12 of the Laws of Wisconsin for 1887, granted a permit for the construction of the dam in question in the Wisconsin River at Tomahawk. (R. 540) Petitioner in July, 1936,

acquired said dam, including the permit so granted. (R. 471) The dam was in existence in May, 1889. (R. 415, 457, 645) The Public Service Commission of Wisconsin in 1933 having found the dam in bad condition and dangerous, ordered the same repaired and made safe. (R. 16, 48, 465-471)

The Wisconsin River is located wholly in Wisconsin, having its source near the northern border. It empties into the Mississippi near Prairie du Chien, Wisconsin. It is 430 miles long. (R. 597) Tomahawk Dam is located 100 miles from the source and 330 from the mouth of the river. (R. 224)

Log driving was conducted on the upper part of the river, where Tomahawk is located, to points as far down as Wisconsin Rapids, 216 miles from the mouth of the river. (R. 145, 224)

Log driving on the Wisconsin River ceased about 1915. (R. 112, 115) No logs were driven past Tomahawk since 1907. (R. 603)

Rafts of lumber were floated from, but not above, Merrill, Wisconsin, and from points below Merrill down the Wisconsin, and into the Mississippi River. (R. 127) Merrill is 28 miles below Tomahawk. (R. 224) No lumber was rafted past Tomahawk. (R. 85, 127, 362) Rafting at Merrill ceased in 1880, (R. 87), and all rafting operations on the river ceased in 1887-88. (R. 121, 199, 602, 603)

There is no record of steamboats operating above Wausau. Such steamboats as operated above Wisconsin Rapids for a short time were limited to local operations between Stevens Point and Mosinee, and between Mosinee and Wausau. (R. 286) The decision of the Federal Power Commission refers to no steamboat operations in that portion of the river later than 1880. (R. 605)

Use of the river for logging and rafting has accordingly completely ceased and no commerce is carried on the river. Pleasure boats operate through the Dells at Kilbourn, Wisconsin, almost 200 miles below Tomahawk. (R. 267, 203, 354)

During the period when rafting operations were carried on great loss of life resulted. At Mosinee alone over 100 persons lost their lives in rafting lumber over the falls. In some years as many as 10 persons were drowned there. (R. 366) Loss of life on the river in the process of rafting lumber was a common occurrence. (R. 387) At Trappe Rapids 14 persons were drowned one season. (R. 362) The record contains *specific* references to 13 lives lost by drowning at Mosinee, or one-seventh of the total of 100 referred to. If the other references in the record to *specific* instances of drowning were multiplied by seven, the total drownings would seem to approximate 350.

Not only was there great loss of life, but there was a great loss of the logs and timber, due to the rapids, sand bars, becoming water-soaked, and other causes. (R. 192, 88, 367, 558) The loss involved in rafting lumber was often as much as one-fourth. (R. 425) As soon as a suitable method of getting lumber out was found, rafting ceased. (R. 192, 234, 235)

Nor is it feasible to improve the river for the purpose of making use thereof possible. From Portage to Merrill it was not worthy of improvement, and prospective commerce did not justify the outlay. (R. 563) Huge sums would be required to make the improvements (R. 192), and the improvements were not deemed economically justifiable. (R. 249, 258, 263, 588). Even the lower part of the river, which with the Fox River formed a route for early traffic from the Mississippi to Portage and to Green Bay, Wisconsin, was not

deemed suitable for improvements, (R. 312) and in 1887 attempts to improve the section from the Mississippi to Portage were abandoned. (R. 588)

The wheels of the power plant at the dam will use 2,000 cubic feet per second. (R. 27) The flow of the river at such point averaged 2,020 c.f.s. from October 1, 1915, to September 30, 1935. When the flow of the river is below that amount the water is withheld for a period each day so as to build up the flow. (R. 56) It is released each day, so that the actual flow of the river passes down each day. (R. 29) This operation creates waves, which, however, will on account of natural conditions, disappear within a distance of 125 miles below Tomahawk. (R. 144) Any wave created at Tomahawk is artificially ironed out at Alexander Dam, 23 miles below. (R. 224, 28) Within that distance there is no use being made of the river for interstate commerce.

Rafting of lumber ceased entirely by 1887. (R. 121, 199) The river is not now suitable for the rafting of lumber as that method of use has long been outmoded. (R. 415, 228) The opinion of the Commission that the Wisconsin River is navigable water of the United States is based wholly on past use. (R. 603, 610, 611) Nor can it be made suitable for use at an expenditure of money at all commensurate with the benefits. (R. 192, 249, 258, 263, 563)

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the petition for certiorari is granted are that the United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In not setting aside the order of the Federal Power Commission on the ground that the Federal Power Act does not apply to Tomahawk Dam, inasmuch as it was constructed

under a state license prior to the enactment of the Federal Power Act and before Congress enacted legislation in respect thereto, and inasmuch as, under the language of the Act, it was excepted from the operation of the Federal Power Act; and therefore the Commission had no jurisdiction to require petitioner to take out a license under the Act.

2. In making no distinction as between (a) navigable waters of the United States which are used or suitable for use for transportation in interstate commerce, and (b) those which are not so used or suitable for use—a distinction which is required by a proper construction of the Federal Power Act, and which determines whether a license must be taken out under the Act, or whether a license is granted automatically thereby in the event the interests of interstate or foreign commerce are not affected by a dam.

3. In not setting aside the order of the Federal Power Commission on the ground that the Wisconsin River at Tomahawk, Wisconsin, even though at that point it is a navigable water of the United States over which Congress has jurisdiction, is not "used or suitable for use for the transportation of persons or property in interstate or foreign commerce," and that therefore the Commission had no jurisdiction to require petitioner to take out a license under the Federal Power Act (the interests of interstate and foreign commerce not being affected by the dam).

4. In not setting aside the order of the Federal Power Commission on the ground that the interests of interstate commerce would not be affected by Tomahawk Dam, even on the assumption that the Wisconsin River at that point was subject to the jurisdiction of Congress, though not a navigable water as defined in the Act.

5. In not considering and determining whether there is

substantial evidence to support the finding of the Commission that the interests of interstate or foreign commerce were affected by the dam, which want of consideration is presumably the result of 2 above.

ARGUMENT

POINT I

The Federal Power Act by its terms is not to be construed as affecting any permit or any authority granted pursuant to law prior to its enactment. Tomahawk Dam was constructed pursuant to a permit granted by Wisconsin in 1887 before the Federal Government in 1890 by enactments of general application in respect of navigable rivers entered the field of regulation, and the dam is therefore excepted from the operation of the Act.

The Federal Power Act was enacted June 10, 1920, and Section 23 (a) thereof (Title 16 U.S.C.A., § 816) provides as follows:

> "The provisions of sections 791-823 of this title shall not be construed as affecting any permit * * * granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, * * *."

Section 23 (b) thereof (Title 16 U.S.C.A., § 817) provides in part as follows:

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, * * * in any of the navigable waters of the United States, * * * except under and in accordance with the terms of a permit * * * granted prior to June 10, 1920, or a license granted pursuant to this chapter."

The question is whether the permit and authority referred to above includes a permit granted by a state.

The first enactment by Congress of general application to navigable rivers was the Rivers and Harbors Act of September 19, 1890.

The permit to construct, maintain and repair the dam was obtained from the Legislature of Wisconsin on February 26, 1887, under Chapter 12 of the Laws of Wisconsin for the year 1887. (R. 540) Work was immediately commenced and the dam was in existence in 1889 (R. 415, 645) which was approximately a year before the enactment of the Rivers and Harbors Act of 1890, and consequently before Congress entered the field of regulation.

That the franchise granted by the State of Wisconsin under those circumstances was a valid permit is established (a) by the decisions of this court, (b) by reference to the pertinent language of the Rivers and Harbors Acts of 1890, of 1899, and of the Federal Power Act, and (c) by statements in Congress when the Federal Power Act was before it for consideration.

In *City of Newark, et al. vs. Central Railroad Company of New Jersey, et al.*, 267 U. S. 377, 381, a question arose as to the right to reconstruct a bridge over a navigable water of the United States, the bridge having been built pursuant to a state license. The court said:

> [267 U. S. 381] "At the time the bridge was built, there was no applicable legislation by Congress. And it was within the power of the State to authorize its construction."

In *Pound vs. Turck*, 95 U. S. 459, it was argued that the State of Wisconsin had no power to grant a permit to build a dam in the Chippewa River, and that the statute was repugnant to the provision of the Constitution giving Congress authority to regulate commerce. On that the court said:

> [95 U. S. 462] "* * * The proposition is not a new one in this court, and cannot be sustained as applicable to the case before us without overruling many well-considered decisions, no one of which has ever been overturned, though the doctrine announced has been occasionally questioned."

Other cases establishing the right of a state to grant permits for erection of structures in or over navigable waters prior to the time of the assumption by Congress of jurisdiction are:

> **Willson and others vs. The Black Bird Creek Marsh Company, 27 U. S. 245, 250;**
>
> **Gilman vs. Philadelphia, 70 U. S. 713, 729, 732;**
> **Cardwell vs. American Bridge Company, 113 U. S. 205, 208, 209;**
>
> **International Bridge Company vs. People of the State of New York, 254 U. S. 126, 132.**

The language of the Rivers and Harbors Acts of 1890, of 1899, and of the Federal Power Act shows that Congress intended by the reference to a permit "given pursuant to law" (the language of the Federal Power Act) a permit from a state.

The Rivers and Harbors Act of September 19, 1890 (C. 907, 26 Stats. 454, 455) provided that the creation of any obstruction to navigable capacity was prohibited unless *"affirmatively authorized by law."* In the Rivers and Harbors Act of 1899 (Title 33 U.S.C.A. § 403), the prohibition applied unless the creation of the obstruction was *"affirmatively authorized by Congress."*

When the Federal Power Act was enacted the term *"permit * * * given pursuant to law"* was used, which is generally similar to the language "authorized by law" used in the Rivers and Harbors Act of 1890.

In *United States vs. Bellingham Bay Boom Co.*, 176 U. S. 211, at 215, it was said in reference to the Rivers and Harbors Act of 1890 that it must be assumed that Congress was well aware of the fact that an obstruction built under state authority was "*authorized by law*". It must also be assumed that when Congress enacted the Federal Power Act and used the term "permit given pursuant to law," it also was aware of the fact that an obstruction built under state authority was built under a "permit given pursuant to law."

In *Wisconsin, et al. vs. Illinois, et al.*, 278 U. S. 367, 412, the language in the Rivers and Harbors Act of 1899 as compared with the language in the 1890 Act was said to be intended to make mere state authorization inadequate, thus recognizing that under the language of the Act of 1890 (which is generally like that in the Federal Power Act) state authorization was adequate.

Neither the Rivers and Harbors Act of 1890 nor of 1899 was retroactive so as to make unlawful a structure which was lawful at the time it was built under state authority.

United States vs. Bellingham Bay Boom Co., 176 U. S. 211, 214, 215;
Gring vs. Ives, 222 U. S. 365, 370.

Congress at the time of the adoption of the Federal Power Act was aware that many structures had been erected in navigable waters under permits granted by states. That Congress intended to exclude them from the operation of the Federal Power Act is shown by the statements on the floor of the House by the Chairman of the Committee, as shown by the Congressional Record, Volume 56, Part 9, Pages 9047 and 9048.

The following is the substance of the statements in the Record:

Reference was made to Section 23 of the Federal Power Act and to the term "permit * * * given pursuant to law * * *," and specific reference was made to the fact that there were in existence in navigable waters dams and other structures under franchises and permits from the states. A question was raised as to the effect of Section 23 of the Federal Power Act upon those structures, and the Chairman was asked specifically as to whether he took the position "* * * that existing rights granted by charter by any State are not interfered with by the provisions of this bill," and to this he replied "Absolutely," and that they would not be interfered with, nor would conditions be added to them unless they voluntarily came in under the Act, as the Act permitted they might do.

That there were many such dams in the Wisconsin River and its upper tributaries is shown in the Record. (R. 224, 225) There are also many such dams in other states.

In the opinion of the court below it is said that the plain language of Section 23 of the Federal Power Act makes it unlawful to construct, operate or maintain a dam in a "navigable water of the United States" without a license, and that Congress did not mean to allow existing obstructions to continue unregulated.

It is respectfully submitted that the history of the two Rivers and Harbors Acts referred to, and of the Federal Power Act, and the statements of this court that dams erected under state license were "affirmatively authorized by law," lead to a contrary conclusion, to-wit, the conclusion that dams constructed prior to 1890 under state authorization in navigable waters of the United States are not subject to the Federal Power Act.

The matter is of such vital importance to the public, to state regulatory bodies, and to the many owners of dams

throughout the United States, as to make the determination by the Supreme Court of the question here presented desirable.

POINT II

The Circuit Court of Appeals construed the Federal Power Act as requiring an application for a license to maintain a dam, irrespective of whether or not at the point involved the river was used or suitable for use in interstate commerce. Such construction is not warranted.

The Wisconsin River at Tomahawk Dam is no longer used or suitable for such use. This appears from the statement of the case, pages 8-10. Accordingly, under the Act, a license from the Commission is required only if the interests of interstate commerce are affected by the dam. Because of the lower court's construction of the statute it did not pass upon the question as to whether the Commission's findings that the dam affected interstate commerce were supported by substantial evidence, considering as final the question of whether substantial evidence supported the finding that the "Wisconsin River was and is a navigable water of the United States."

In the presentation of this argument it will be helpful to resort to the following sketch and analysis:

The following line represents a river over which Congress has jurisdiction by virtue of its power to regulate interstate commerce. The line includes both that portion of the river which is not used or suitable for use in the transportation of persons and property in interstate commerce, as well as the portion which is so used or is suitable for such use.

A	B
The A portion of the line represents that portion of the river which is used or suitable for use in the transportation of persons or property in interstate commerce.	The B portion of the line represents that portion of the river not so used or suitable for use.

The A portion of the line represents a navigable water as defined in Section 3 (8) of the Federal Power Act, 16 U.S.C.A. § 796 (8). We quote the applicable language:

> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * *and which* * * * *are used or suitable for use* for the transportation of persons or property in interstate or foreign commerce, * * *." [Italics supplied]

The B portion is that portion of a stream which in Section 23 (b) of the Act is not "navigable waters" as defined in the Act, because not so used or suitable for use, but nonetheless is water over which Congress has jurisdiction.

Section 23 (b) of the Act provides in part as follows:

> "* * * Any person, * * * intending to construct a dam * * * in any stream or part thereof, *other* than those defined herein as navigable waters, [that is waters which are used or suitable for use] *and over which Congress has jurisdiction* under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected * * * such person, * * *

> shall not construct, maintain, or operate such dam * * * until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, * * * permission is hereby granted to construct such dam * * * in such stream upon compliance with State laws." [Italics supplied.] (16 U.S.C.A. § 817)

If a dam is built in portion A of the stream, an application for a license from the Commission is required (except in the case of a permit given pursuant to law prior to the enactment of the Federal Power Act).

In case a dam is built in portion B of the stream, then if the Commission finds that the interests of interstate commerce are not affected by the dam, permission is automatically granted by the Act itself. It is only when the Commission finds that the dam affects the interests of interstate commerce that a license must be secured from the Commission.

It is obvious from the decision of the Circuit Court of Appeals that the court was of the opinion that the term "navigable waters" as defined by the Federal Power Act was synonymous with "navigable waters of the United States" as previously defined by the courts, as it said:

> "The principal question is whether the Wisconsin River is a navigable river of the United States.
>
> * * *
>
> "* * * In the Act, Congress defined 'navigable waters' as those parts of streams or other bodies of water 'which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce,' § 3 (8), 16 U.S.C.A. § 796 (8). *However, long*

> *before the passage of the Federal Power Act, courts had occasion to define what were 'navigable waters' of the United States."* [Italics supplied]

Then followed the reference to the definition in *The Daniel Ball,* 77 U. S. 557, 563, of the term "navigable waters."

That Congress intended a distinction to be made between "navigable waters of the United States" and "navigable waters" as defined in the Act is made clear by the language of Section 23 (b) of the Act to the effect that:

> "* * * Any person, * * * intending to construct a dam * * * in any stream * * * *other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce* * * * shall before such construction file declaration of such intention * * *." [Italics supplied]

To come within the meaning of that language a stream must be one over which Congress has jurisdiction under its authority to regulate commerce (that is, it must be one which, according to the court decisions, is a navigable water of the United States), but it must be one other than those defined in the Act as navigable waters.

This would necessarily make the language "other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce" apply to waters subject to the jurisdiction of Congress which are not used or suitable for use in the transportation of persons or property in interstate commerce.

The reference of the Circuit Court of Appeals to the definition by the courts of "navigable waters of the United States" is based upon *United States vs. Appalachian Power Company,*

311 U. S. 377, 408, and the Circuit Court of Appeals quoted from that decision: "When once found to be navigable, a waterway remains so," and "Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers *in the constitutional sense.*" [Italics supplied.]

This court, in referring to "navigability of rivers in the constitutional sense" reaffirmed the doctrine that, once subject to the jurisdiction of the United States, a river always remains so subject, regardless of whether it is used or continues to be suitable for use in interstate or foreign commerce, but it did not determine, as the decision of the Circuit Court of Appeals seemed to think, that because a river may be navigable in a constitutional sense it is subject to the jurisdiction of the Commission regardless of whether it is so used or suitable for use.

Had the Circuit Court of Appeals construed the Federal Power Act as we contend it should be construed, namely, that navigable waters over which the United States has jurisdiction are classified in the Act as (a) those which are used or suitable for use, and (b) those which are not used or suitable for use, it would have been obliged to conclude that the Wisconsin River at Tomahawk is not used or suitable for use and therefore that no license was required from the Commission, unless the interests of interstate or foreign commerce were affected by the dam.

The opinion of the Federal Power Commission itself shows that all use of the river has long since ceased. (R. 603-5)

That the river is *not suitable* for the transportation of persons or property in interstate commerce is shown by the

record. During the time when rafting was resorted to, it was accompanied by great loss of life. At Mosinee alone over 100 lives were lost in rafting lumber over the falls. (R. 366) In some years 10 lives were lost there. At Trappe Rapids 14 persons lost their lives in one spring. (R. 362) Out of 100 lives lost at Mosinee, the record refers specifically to only 13, or one-seventh. If the specific references to drownings on account of rafting as shown in the record were multiplied by 7, the number would approach 350.

Such a record of loss of life establishes, we submit, that the river is not suitable for use. *The present stage of our civilization and economy would not tolerate use of a river under such circumstances.*

In rafting lumber down the river substantial damage resulted to the lumber by reason of being soaked by water, striking rocks, contact with the sand, and other causes. This damage amounted to as much as 25%. (R. 88, 193, 425)

In 1899 the river was described as well-nigh worn out for logging purposes. (R. 415)

Not being suitable for use, the portion of the river where Tomahawk Dam is located falls within the classification in the diagram as B, and an application for a license is necessary only if the dam there located affects the interests of interstate or foreign commerce. The question of the effect on the interests of interstate and foreign commerce will be the subject of Point III.

POINT III

The Dam Does Not Affect the Interests of Interstate or Foreign Commerce.

The Federal Power Commission found that the dam did affect the interests of interstate or foreign commerce. The

Circuit Court of Appeals did not determine whether that finding of the Commission was supported by substantial evidence. It would have been necessary for the Circuit Court of Appeals to pass on that question if it had construed the statute as making a distinction between navigable waters as defined in the Act, and navigable waters over which the United States has jurisdiction.

As pointed out in the Statement of Facts, the average flow of the river at Tomahawk over a period of 20 years was 2,020 c.f.s. The wheels of the power plant at Tomahawk Dam will use 2,000 c.f.s.

Freshets were needed both for the floating of logs and the rafting of lumber. (R. 392, 409, 89, 367) Freshets, therefore, occurred when the flow of the water was more than 2,000 feet.

It is only when the flow of the water is less than 2,000 c.f.s. that it will be necessary to hold back the flow for a certain period each day, so that for the remainder of the period 2,000 c.f.s. are available. Accordingly, waves would be created only when the flow is less than normal, or when there would be no freshets, and when the flow is less than normal, there would be neither rafting nor logging on the river, because there would be no freshets.

As pointed out on page 10 of the brief, any waves created by Tomahawk Dam would in the natural process be ironed out within 125 miles of Tomahawk, and are in fact ironed out artificially by the operation by petitioner of Alexander Dam.

Because of these facts the interests of interstate or foreign commerce could not possibly be affected by the operation of Tomahawk Dam.

WHEREFORE, your petitioner prays that the petition for a writ of certiorari be granted, and that the case be reviewed, and the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

J. G. HARDGROVE
BERT VANDERVELDE
FRED W. GENRICH
Counsel for Petitioner

MILLER, MACK & FAIRCHILD
Of Counsel

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 1297

STATE OF WISCONSIN,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION OF THE STATE OF WISCONSIN FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JOHN E. MARTIN,
Attorney General of Wisconsin,

H. T. FERGUSON,
Assistant Attorney General of Wisconsin,

Counsel for Petitioner.

THE GILMAN PRESS, MADISON, WISCONSIN

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Respondent.

PETITION OF THE STATE OF WISCONSIN FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, State of Wisconsin, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment of that court entered on the 26th day of February, 1945, in the case of State of Wisconsin and Public Service Commission of Wisconsin vs. Federal Power Commission, the docket number of which in said court is 8463. A certified transcript of the record in the case, including proceedings in said Circuit Court of Appeals, is furnished herewith.

SUMMARY AND SHORT STATEMENT OF THE MATERIAL INVOLVED

The judgment, review of which is herein prayed for, affirmed an order of the Federal Power Commission under date of July 30, 1943, which directed the Wisconsin Public Service Corporation, a Wisconsin corporation, to file an application for a license under the Federal Power Act for the operation and maintenance of the so-called Tomahawk Dam on the Wisconsin River, located near the source of that river in Lincoln County, Wisconsin. The judgment of the Circuit Court of Appeals thus entered was rendered upon a petition for review of said order of the Federal Power Commission made by and on behalf of said Wisconsin Public Service Corporation and by and on behalf of the State of Wisconsin and the Public Service Commission of Wisconsin.

JURISDICTION

1. The statutes under which jurisdiction is invoked are Section 240(a) of the Judicial Code, 28 U. S. C. A. §347, and Section 313 of the Federal Power Act (16 U. S. C. A., §825 (1)). The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit Court, sought to be reviewed, is February 26, 1945.

QUESTIONS PRESENTED

1. Was the order of the Federal Power Commission made under date of July 30, 1943 (thereafter affirmed by denial of an application for a rehearing with respect thereto on February 21, 1943) which required said Wisconsin Public Service Corporation to apply for a license under the Federal Power Act for its said Tomahawk Dam, within the power and authority validly vested in said Federal Power Commission?

2. Does the order of the Federal Power Commission, above described, impair or infringe the sovereign rights or privileges of the State of Wisconsin?

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI

The State of Wisconsin contends:

(1) That, as a sovereign state of the United States, it has jurisdiction and authority to regulate the use, level and flow of all flowing streams within its borders, subject only to the exercised authority of the federal government under the Commerce Clause of the Federal Constitution.

(2) That under the evidence in the record the Wisconsin River at and in the vicinity of the so-called Tomahawk Dam is not a navigable water of the United States such that the Congress, under said Commerce Clause, has power to vest in any federal agency the power or authority

to regulate the use, level and flow of the waters of the Wisconsin River at or in the vicinity of said Tomahawk Dam.

(3) That even if it could be said or held that the waters of the Wisconsin River at or in the vicinity of the Tomahawk Dam are navigable waters of the United States and subject to the jurisdiction of Congress as aforesaid, it is nevertheless true that the Congress has not, either by the Federal Power Act, or otherwise, vested any power or authority in the Federal Power Commission to regulate the use, level and flow of the waters of the Wisconsin River at or in the vicinity of said Tomahawk Dam.

(4) That if the first and either the second or the third of the foregoing contentions should be sustained by this court, the purported exercise of federal authority, by and through the order here involved, requiring that an application be made to obtain a federal license for the operation and maintenance of said Tomahawk Dam, constitutes an invasion of the sovereign rights and privileges of the State of Wisconsin.

(5) That the judgment of the lower court affirming such order was made upon a misconception of the extent of the authority vested in the respondent Commission by the Federal Power Act.

(6) That the holding of the lower court as to the navigability of the Wisconsin River is contended to be contrary and is probably contrary to the decisions of this court.

(7) That the order under review invades the sovereign rights and privileges of the state, and the validity of such order is therefore a matter of great and national importance.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of Wisconsin,

H. T. FERGUSON,
Assistant Attorney General of Wisconsin,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief should be read in connection with the brief submitted by Wisconsin Public Service Corporation in support of its petition for a writ of certiorari for a review of the same judgment of the Circuit Court of Appeals for the Seventh Circuit.

We believe it unnecessary to duplicate in this brief the comprehensive statement of facts and evidence proper for the consideration of the court in passing upon the petition of the State of Wisconsin for a writ as herein made. Reference is respectfully made to such statement of facts and evidence and the court is requested to consider the same as having been incorporated in this brief.

SPECIFICATIONS OF ERRORS

The errors which this petitioner will urge, if its petition for certiorari is granted, are that the United States Circuit Court for the Seventh Circuit erred:

1. In holding that the waters of the Wisconsin River at and in the vicinity of Tomahawk are navigable so as to be subject to the jurisdiction of the federal government under the Commerce Clause of the United States Constitution.

2. In holding that the Federal Power Act vests in the Federal Power Commission the power and authority to require an application to said Commission for the construction and maintenance of the Tomahawk Dam.

ARGUMENT

POINT I

THE WISCONSIN RIVER AT THE TOMAHAWK DAM IS NOT NAVIGABLE IN THE FEDERAL SENSE

We maintain that the Circuit Court of Appeals was in error in holding that the Wisconsin River at Tomahawk is now, or ever was, navigable in the sense that it was used or susceptible of use in the conduct of interstate commerce. We contend that such holding is in conflict with the following cases cited in the opinion of the court:

North American Dredging Co. vs. *Mintzer,* 245 Fed. 297.

United States vs. *Rio Grande Irrigation Co.,* 174 U. S. 690.

Leovy vs. *United States,* 177 U. S. 621.

Oklahoma vs. *Texas,* 258 U. S. 574.

Brewer-Elliott Oil & Gas Co. vs. *United States,* 260 U. S. 77.

The record in this case is clear to the effect that the only commercial use that was ever made of the Wisconsin River at or anywhere near the vicinity of the Tomahawk Dam was for the flotation of logs down that stream for one or two short seasons in each year for a number of years ending in 1907. As was said by one of the Judges of the Court of Appeals during the course of the oral argument before that court: "Everyone knows that the Wisconsin River at Tomahawk is valueless for navigation or

commercial purposes and is good only for the development of power."

We contend that under the doctrine of *United States* vs. *Appalachian Power Company*, 311 U. S. 377, the navigability of the Wisconsin River at Tomahawk is not properly "determined by a formula;" that the formula or adage, "once navigable, always navigable," adopted in *Economy Light & Power Co.* vs. *United States*, 256 U. S. 113, is not applicable, under the facts shown by the record in this case, to the waters of the Wisconsin River at and in the vicinity of Tomahawk; that this adage or formula constitutes, at the most, a presumption that the former use of a stream or other water for navigation thereof results in a conclusion of fact that such water is still suitable for use for such navigation, even though such use may have ceased for a great number of years; but that this presumption is nevertheless subject to rebuttal and is completely rebutted by evidence in this case, which shows clearly and conclusively that the water has not only ceased to be so used but is no longer susceptible of that use.

Accordingly, we maintain that while the term "navigability" in the federal sense thereof is a legal concept, nevertheless as was indicated in *United States* vs. *Appalachian Power Company, supra*, the determination of whether any particular stream of water is or is not navigable, in the same sense, is essentially and primarily a question of fact to be determined upon evidence in accordance with the approved definition of such legal concept of navigability. All agree that such legal concept was correctly defined in *The Daniel Ball* case, 77 U. S. 557, as meaning "used or . . . susceptible of being used, in their ordinary condition as highways for commerce." And we maintain

that under the evidence as presented in the record in this case and in accordance with the definition as laid down in *The Daniel Ball* case, *supra,* the Wisconsin River is not now a navigable stream of the United States or subject to federal jurisdiction as such. In other words, we maintain that the doctrine "once navigable, always navigable" may have been properly applicable to facts such as those presented in *Economy Light & Power Co.* vs. *United States, supra,* but is not applicable to the facts clearly demonstrated by the evidence in the record in this case.

We do not concede that the trial court was correct in holding that the flotation of logs, between the source of the Wisconsin River and a point in that river at Whitney Rapids below Tomahawk, constituted an operation in interstate commerce because the logs were there manufactured into lumber and that lumber was transported beyond the boundaries of Wisconsin. But even if that holding be correct, the fact that either such logs or such lumber was a subject of interstate commerce does not establish that the flotation of the logs in the river above Whitney Rapids amounted to a navigation of that portion of the Wisconsin River within any federal or constitutional definition of the term "navigation."

It is practically conceded that unless the Wisconsin River at or in the vicinity of Tomahawk is navigable within such constitutional definition, the order under review in this case is beyond the powers vested in the respondent Commission. We therefore submit that this court should consider and determine the question of navigability as thus raised.

POINT II

UNDER THE TERMS OF THE FEDERAL POWER ACT THE RESPONDENT COMMISSION IS WITHOUT AUTHORITY TO REQUIRE A LICENSE FOR THE TOMAHAWK DAM

Even if it be held that the Wisconsin River in its entirety is navigable in the constitutional sense, it does not follow that Congress must have given authority to the respondent Commission to exercise any specific power with respect to any particular portion of that water. The respondent Commission has only the power vested by the Federal Power Act.

The Federal Power Act prescribed a different definition for the term "navigable waters" than that which had been laid down by this court in *The Daniel Ball* case, *supra*. Under the definition in the case just cited waters are navigable if they are either used or *susceptible* of use in the conduct of interstate or foreign commerce. Under the definition in the Federal Power Act, a water to be navigable must be either used or *suitable* for use. (Federal Power Act, Part I, Section 3(8)) Thus there is a clear distinction between "navigable waters," over which Congress has power under the Commerce Clause of the United States Constitution, and "navigable waters" as defined in the Federal Power Act.

The provisions of Section 23(b) of the Federal Power Act require that a license be applied for and issued by the respondent Commission for all power dams constructed, operated or maintained in "navigable waters" as defined in that Act; but also provides that a license is thus required for any such dam constructed in waters "other than

those herein defined as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states" *only* in case the respondent Commission shall make a valid finding that "the interests of interstate or foreign commerce would be affected" by such dams.

Even if the waters of the Wisconsin River at Tomahawk could be held to be navigable in the constitutional sense of *The Daniel Ball* definition, we maintain that those waters cannot possibly be held to be navigable within the definition of that term in the Federal Power Act; that those waters are such that the Federal Power Act does not *in terms* require a federal license for a dam constructed or maintained therein; and that a license for a dam in such waters can only be required by the Commission upon a valid finding that the dam in some way affects interstate or foreign commerce.

As we read the opinion of the Circuit Court of Appeals, that court holds that the mere fact that a dam is in a water which is navigable in the constitutional sense, is sufficient to justify a requirement of the respondent Commission that an application be made to it for a license for the construction and maintenance of said dam. We maintain that this is palpable error; that the Wisconsin River is clearly not navigable within the definition of the term "navigable waters" in the Federal Power Act; that in arriving at its decision in this case the Circuit Court of Appeals should therefore have considered and determined the question of whether the evidence before the respondent Commission was sufficient to establish that the construction and maintenance of the Tomahawk Dam would actually affect interstate or foreign commerce; that the Circuit Court of Ap-

peals gave no consideration to that question; and that the decision of the Circuit Court of Appeals was therefore arrived at upon the basis of a misconception of the provisions of the Federal Power Act and of the powers thereby vested in the respondent Commission.

We contend that the facts in this case show that the Wisconsin River, even if it be navigable in the constitutional sense, is not a navigable water as defined in the Federal Power Act; that the requirement of a license for the Tomahawk Dam had to be predicated therefore upon a valid finding that the Dam would affect foreign or interstate commerce; that the evidence before the respondent Commission is admittedly inadequate to sustain any such finding; and that the judgment approving that said order is therefor erroneous.

We contend, therefore, that it was incompetent for the respondent Commission to enter an order requiring the Wisconsin Public Service Corporation to apply for a license for the construction and maintenance of the Tomahawk Dam except upon the valid finding that such construction and maintenance of that dam would affect interstate or foreign commerce. As before stated, the record is completely and wholly devoid of evidence upon which the respondent Commission could reasonably conclude that the construction or maintenance of that dam affects or would by any possibility ever affect any interstate commerce whatsoever.

We submit, therefore, that the order requiring that license was invalid; that the Circuit Court of Appeals arrived at its judgment affirming that order upon the basis of a misconstruction or misunderstanding of the extent of the power vested in the respondent Commission by the

Federal Power Act; and th[at this court should review the
decision and judgment th[us made, to the end that the
extent of the power vested [in the respondent Commission
may be definitively deter[mined and authoritatively pro-
nounced.

PO[INT III

IMPORTANT RIGH[TS OF THE STATE ARE
INV[OLVED

The waters of the Wis[consin River are public waters—
regardless of whether they[are navigable in any sense or
under any definition. The[State of Wisconsin is clearly
vested with the sovereign[power of regulating the use,
level and flow of such wat[ers for the benefit of the public
and the protection of pub[lic rights therein—subject only
to the superior right, if a[ny, of the United States under
the Commerce Clause of [the Federal Constitution.

The order here invol[ved required the owner of the
Tomahawk Dam to apply [for a license. Under the provi-
sions of the Federal Powe[r Act that license must contain
a so-called recapture clau[se which, in reality, is an option
for the purchase of the Da[m by the United States at a fixed
or determinable price. S[hould such option be exercised
the right of the state to r[egulate the maintenance and op-
eration of the dam, and l[ikewise all revenues to the state
from taxation of the dam [and appurtenant property would
cease. Likewise the asse[rtion by respondent Commission
of authority over the op[eration and maintenance of the
dam results either in sup[erseding all right of the state to
provide such regulation, [or else in a concurrent power of

regulation between the state and the United States with respect to the same matters.

In either case, the power and authority of the state is curtailed. If such curtailment is unlawful, then the sovereign rights of the state are infringed and impaired.

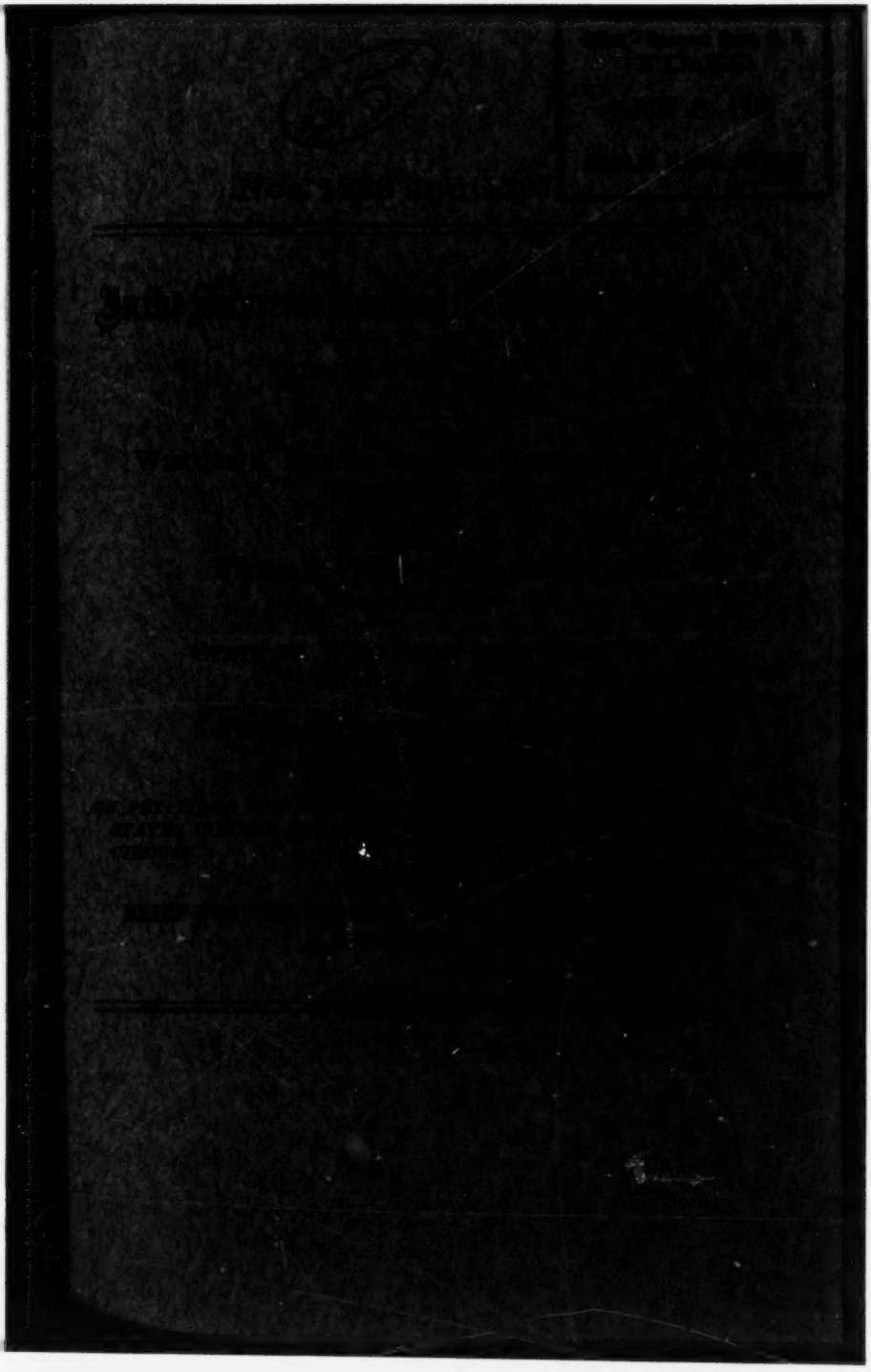
We maintain that the assertion by the respondent Commission of any authority or jurisdiction whatsoever over the Tomahawk Dam is an unlawful attempt to impair such sovereign rights of the State of Wisconsin; and we submit, therefore, that this court should grant the state's petition for review of a judgment which upholds the validity of that assumption of power.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of Wisconsin,

H. T. FERGUSON,
Assistant Attorney General of Wisconsin,

Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1286

WISCONSIN PUBLIC SERVICE CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

No. 1297

STATE OF WISCONSIN, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 644)[1] is not yet reported. The Federal Power

[1] Although a separate record was filed with each petition, the records are in the main identical, in that the court below

Commission's opinion, determination and order (R. 595, 612) are reported, 3 F. P. C. 495, 50 P. U. R. (NS) 305.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 26, 1945 (R. 655). The petition of Wisconsin Public Service Corporation for a writ of certiorari was filed on May 17, 1945; that of the State of Wisconsin was filed on May 21, 1945. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*) and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The first sentence of Section 23 (b) of the Federal Power Act excepts from its licensing requirements any dam constructed and maintained "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920." The petitioner Wisconsin Public Service Corporation (hereinafter referred to as the Corporation) seeks to present the question whether the conditions of this exception are met in the case of a permit granted by state, as distinguished from federal, authority.

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wrote but a single opinion, sustaining a single order of the Federal Power Commission, which in turn was based upon a single record of proceedings before it. For all purposes of this brief, record references apply equally to either record.

2. Both petitioners raise the question whether there was warrant in the record and a reasonable basis in law for the Federal Power Commission's determination that the Wisconsin River at Tomahawk, Wisconsin, is one of the "navigable waters of the United States," as that term is used in the first sentence of Section 23 (b) of the Federal Power Act.[2]

STATUTES INVOLVED

The relevant provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) and of Section 31.18, Wisconsin Statutes, 1937, are set forth in the Appendix, *infra*.

STATEMENT

On May 27, 1937, the Corporation filed with the Federal Power Commission (hereinafter referred to as the Commission) a Declaration of Intention

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[2] As pointed out in the argument, *infra*, the petitions differ in some respects in the contentions which they advance on this issue.

The Corporation also seeks to raise the question whether the record is adequate to support the Federal Power Commission's additional finding, under the second sentence of Section 23 (b), that "the interests of interstate commerce would be affected by the reconstruction" of the Corporation's dam at Tomahawk (R. 611). This finding is material only if it is held that the Commission was in error in concluding that the Wisconsin River at Tomahawk was "navigable" (cf. notes 6, 7, *infra*); and since we regard petitioners' contentions on the latter issue as wholly lacking in merit we consider it unnecessary to present argument as to the effect of the dam on the interests of interstate commerce.

(R. 1), under Section 23 (b) of the Federal Power Act,[3] to "reconstruct" a dam across the Wisconsin River at Tomahawk, in Lincoln County, Wisconsin, on the site of a deteriorated (R. 17–19, 469, 484), rock-filled, timber crib dam originally completed in about 1897 under a state franchise granted in 1887 (R. 467, 598).[4] At about the same time, the Corporation applied for, and on August 26, 1937, it obtained from the Public Service Commission of Wisconsin a permit under Chapter 31, Statutes of Wisconsin, "for rebuilding and operating and maintaining the Tomahawk dam" (R. 478).[5]

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[3] Section 23 (b) as amended in 1935 (August 26, 1935, c. 687, 49 Stat. 846, 16 U. S. C. 817) requires a Declaration of Intention to be filed with the Commission whenever a dam is intended to be constructed across a "stream or part thereof, other than those defined [in the Act] as navigable waters, and over which Congress has jurisdiction under" the commerce clause. If, upon investigation, the Commission "shall find that the interests of interstate or foreign commerce would be affected by such proposed construction," Section 23 (b) prohibits construction, operation or maintenance thereof until a license shall have been issued pursuant to the Act.

[4] On July 14, 1936, the Corporation had purchased for $8,000 (R. 475) the old timber crib dam and the franchise granted by Chapter 12, Laws of Wisconsin, 1887 (R. 540), under which the dam had been built originally (R. 17, 471–473).

[5] Section 5 of Chapter 12 of the 1887 Laws had provided that it might at any time be amended or repealed (R. 542). Chapter 380, Laws of Wisconsin, 1915 (Section 31.18, Wisconsin Statutes, 1937) provided, among other things, that no substantial alteration should be made in any dam theretofore constructed, without obtaining an order therefor from

Extended hearings here held on the Declaration of Intention filed with the Federal Power Commission, and the State of Wisconsin (hereinafter referred to as the State) and the Public Service Commission of Wisconsin were permitted to intervene in the proceedings (R. 7–8). After the hearings had been closed and briefs had been filed, the Commission, on its own motion, reopened the hearings for the purpose of taking additional evidence as to the navigability of upper portions of the river (Tr. 550–551, not printed). If the river was navigable a license would in any event be required in the absence of a permit granted prior to June 10, 1920, since the first sentence of Section 23 (b) makes it unlawful for "any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam * * * across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to" the Act.

On July 30, 1943, the Commission entered its opinion and order (R. 595–611, 612–613) wherein, after making detailed subsidiary findings (R. 597–606), it found that because of the "regular use of the Wisconsin River over a long period of

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the Railroad Commission (subsequently changed to the Public Service Commission) entered after investigation and upon findings duly made.

years for the transportation of large quantities of logs, lumber, rafts, and other forest products to mill and market to points within the State of Wisconsin and in other States," the river "is navigable throughout its entire length" (R. 610). The Commission concluded that the Wisconsin River is a "navigable water of the United States" within the meaning of the Act (R. 611). It further concluded that "the interests of interstate commerce would be affected by the reconstruction proposed" (R. 611, 613).[6] On the basis of these conclusions it directed the Corporation to apply for a license for "operation and maintenance" of the project (R. 613) which the Corporation had constructed while the proceedings were pending before the Commission (R. 612).

The Corporation, the State and the Public Service Commission filed applications for rehearing (R. 614, 617, 619). On September 21, 1943, the Commission denied the Corporation's application (R. 621), and dismissed the others (R. 623). The Corporation, the State and the Public Service Commission petitioned the United States Circuit Court of Appeals for the Seventh Circuit for review of the Commission's order of July

[6] A finding as to the effect of a dam on the interests of interstate commerce is required only under the second sentence of Section 23 (b), applicable to nonnavigable waters alone. In view of the Commission's principal finding that the river was navigable, its second finding was immaterial, though responsive to the Declaration of Intention by which the proceeding had been initiated.

30, 1943, under Section 313 (b) of the Act, and on February 26, 1945, that court affirmed the order (R. 655).[7]

ARGUMENT

1. We think it clear that the exception in Section 23 (b) for dams constructed "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920" refers only to permits or rights-of-way conferred by federal, as contrasted with state, authority. The issue, of course, is one of statutory construction, not of federal jurisdiction. Cf. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 422–424. Were the prohibitions of Section 23 (b) directed only to private enterprise there might be force to the argument of the petitioner Corporation. But states and municipalities as well as private organizations fall within the ambit of the section. As was said in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C. C. A. 2), certiorari denied, 320 U. S. 792, in construing the similar language of Section 23 (a), the inclusion of states within the prohibition "precluded the state's immunity as to projects operated by itself, for the only immunity conferred is upon 'permits',

[7] As the court concluded that the Commission had properly found the river to be navigable, it had no occasion to, and did not, pass upon the propriety of the second finding, as to the effect of the dam upon the interests of interstate commerce. See note 2, *supra*.

'rights-of-way' or 'authority' which some authority has granted, and a state acts of its own authority and not by grant. Yet it would be absurd to suppose that a corporation operating under a state's license could be immune from federal control when the same 'project' would not be, if operated by the state itself" (p. 791). The exception of federal permits issued prior to the adoption of the Act in 1920 is to be explained by this Court's holdings as to the indefeasibility of a federal grant once made and acted upon (*United States* v. *Central Pacific R. R. Co.,* 118 U. S. 235, 238; *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51, 63, 64); but no such considerations could have motivated an exception in favor of state-granted permits. As said in the *Niagara Falls* case, *supra,* again at p. 791:

> * * * it would have been a groundless compunction which should have protected "permits," "rights-of-way" or "authority" granted by municipalities or states. The purpose being to conserve all water power, so far as it was national, it would have been an anomaly to exempt anyone—states or individuals—who by an earlier unauthorized occupation had assumed to appropriate any part of this natural resource. No prescription could in law run against the nation; we must not impute to Congress any willingness to grant prescription as a favor.

While the question is doubtless important in the administration of a vital federal statute, the petitioner Corporation presents neither authority nor argument for the view that the construction adopted by the court below is subject to sufficient doubt to deserve consideration by this Court. The course of decisions has been uniform; as shown by the foregoing excerpts from the *Niagara Falls* decision, the Circuit Court of Appeals for the Second Circuit is in accord with the Commission and the court below; and the same view is implicit in the decision of the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. 2d 155, 156, note 2, 163, certiorari denied, 315 U. S. 806. The holding of this Court in *United States* v. *Bellingham Bay Boom Co.,* 176 U. S. 211, that the term "affirmatively authorized by law" in the Rivers and Harbors Act of 1890 (Act of Sept. 19, 1890, c. 907, § 10, 26 Stat. 454) meant "authorized by a state law," was predicated on the fact that prior to 1890 no federal legislation had been enacted in the field, so that only state laws could have been meant. No such rationale can support a similar construction of language adopted in 1935, after 45 years of federal legislation in the field. In 1935 not only had there been prior federal legislation of a general nature under which the Chief of Engineers and the Secretaries of War, Interior and Agriculture had

issued numerous permits and approvals,[8] but there had also been some eighty acts of Congress authorizing particular water power projects. House Hearings, Committee on Water Power, 65th Cong., 2d Sess., pp. 503–507.[9] These, we believe, are the projects—and the only projects—intended to be saved by the exception.

In any event, we do not believe that on the facts of this case the question which the petitioner Corporation seeks to raise is properly before the Court. The Corporation would rest on the original franchise, granted in 1887 and acquired by it

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[8] Mar. 3, 1899, c. 425, §§ 9 and 10, 30 Stat. 1151, 33 U. S. C. 401, 403; Feb. 15, 1901, c. 372, 31 Stat. 790, 16 U. S. C. 79, 43 U. S. C. 959; Jan. 21, 1895, c. 37, § 2, 28 Stat. 635; May 14, 1896, c. 179, 29 Stat. 120, 43 U. S. C. 957.

[9] It may be remarked that the legislative history cited by the petitioner Corporation (Pet. 15–16) related to the Federal Water Power Act as adopted in 1920, when Section 23 contained no equivalent of the provision, now the first sentence of Section 23 (b), requiring licensing for the maintenance of dams in navigable streams.

The cases cited by the Corporation (Pet. 13–14) as upholding the validity of state authorizations for structures in or over navigable waters, issued prior to congressional occupancy of the field, do not affect the undoubted proposition that when Congress does undertake to exercise its power under the commerce clause it is not restricted by its own past inaction. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400. As Chief Justice Groner said for the Court of Appeals for the District of Columbia, construing the provisions of Sections 4 (g) and 23 (b) which were added in 1935: "It cannot be considered, we think, that Congress meant to allow existing obstructions to continue unregulated in the navigable streams of the United States." *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, *supra*, at p. 163.

in 1936. This legislative franchise was by its terms subject to amendment or repeal, and in 1915 Wisconsin by law provided that a new permit should be required for the substantial alteration of dams theretofore constructed.[10] The Corporation in 1937 sought and acquired such a new permit for the "reconstruction" of the Tomahawk dam which gave rise to this litigation. It is this permit, granted many years after June 10, 1920, upon which the Corporation's state authority for the reconstruction must rest. That the state so construes its law follows from the fact that the permit was issued in 1937 after hearing and findings as required by the 1915 act; and it follows inferentially from the fact that the petition of the State of Wisconsin assigns no error in the holding that the Corporation was not within the exception. For this reason we believe that the Corporation is without standing to raise the issue which it seeks to present.

2. Both petitioners contend that the evidence in the record fails to support the Commission's finding that the Wisconsin River at Tomahawk is "navigable" as that term is used in Section 23 (b) of the Act. In part this contention is predicated on an assertion that in defining the term "navigable waters" in Section 3 (8) Congress intended

[10] See note 5, *supra*. That this law amended the original franchise, see *Allaby* v. *Mauston Elec. Serv. Co.*, 135 Wis. 345 (1908); *State* v. *Beloit City School Dist.*, 215 Wis. 409 (1934).

to import into the Act a concept of navigability narrower, in some not too clearly indicated degree, than the broad concept hitherto accepted by this Court in defining the range of federal power over the "navigable waters of the United States." The State of Wisconsin further urges (Pet. 7–9) that the record fails to support a finding of navigability even in the broadest constitutional sense. Both arguments, we believe, are untenable.

As we understand the first of these two arguments, it is that although Congress might properly have required a license for the construction of a dam on such a river as the Wisconsin is shown to be at Tomahawk, on a mere finding of its "navigability" in the constitutional sense, it did not do so. This, petitioners urge, must follow from the fact that the first and second sentences of Section 23 (b) contemplate different situations in which licenses will be required. If "navigable waters of the United States," in the first sentence, is to be construed as comprehending all waters within the meaning of that term as construed in previous decisions of the courts, then, they argue, the second sentence, relating to waters within the commerce power but not "navigable" as defined in the Act, would be meaningless.[11] To give it meaning, the petitioners would limit the

[11] The power over navigation, of course, derives from the commerce power. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404.

term "navigable waters" as used in the Act to rivers currently used, or usable without improvement, as up-to-date interstate water highways.[12] Rivers constitutionally "navigable" but not so used or usable would then fall under the second sentence of the section, requiring permits only on a valid finding of the effect of the particular project on the interests of interstate commerce. As support for this view, petitioners would point to the phrase "used or suitable for use" in the definition in the Act (Section 3 (8)), and would mark the difference between that phrase and the phrase "susceptible of being used" contained in the standard judicial definition of constitutional "navigability" (*The Daniel Ball,* 10 Wall. 557, 563). They would also in some way draw comfort from the fact that Section 3 (8) purports to define "navigable waters" rather than "navigable waters of the United States."[13]

We submit that petitioners' argument is unsupported by authority, and is disposed of by this Court's opinion in *United States* v. *Appa-*

[12] This is what we understand the petitioners to propose as the proper meaning for the phrase "used or suitable for use" in Section 3 (8), the definition section. To show unsuitability in this sense, the petitioner Corporation refers (Pet. 21–22) to loss of life in the river traffic and some wastage of the lumber transported.

[13] See the petition of the Corporation, pp. 19–21. The significance of this fact is obscure, especially in view of the fact that Section 23 (b) requires the licensing of dams on "any of the navigable waters of the United States."

lachian Power Co., 311 U. S. 377. There this Court applied the concept of navigability to a river, if anything, less "suitable" for navigation than the Wisconsin River at Tomahawk. Apart from the factual comparability of the rivers, the opinion makes clear that the term "navigable waters" in the Act is to be given a construction quite as broad as, if not broader than,[14] that previously accorded by the Court to the term for constitutional purposes. Not only does the *Appalachian* opinion (pp. 404–409) discuss the coverage of the Act in terms of the "basic concept of navigability" expressed in the "generally accepted definition of *The Daniel Ball*" (p. 406); it uses the words "susceptibility" and "suitability" interchangeably. The use, and improvements for use, in interstate commerce which were relied upon to establish navigability had all ceased many years before (311 U. S. at 415, 418). Improvements would be necessary to make possible even the most limited use by two-foot draft keelboats (p. 417), and the cost of improvements to make possible navigation by even small steamboats would have been "prohibitive" (p. 418). Plainly, the river was not "suitable" for navigation, as petitioners would use the term; but by

[14] Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 158 (App. D. C.), certiorari denied, 315 U. S. 806.

virtue of its former use for navigation [15] and its susceptibility to improvement it was nevertheless a "navigable water" for purposes of the Federal Power Act.

The petitioners' basic argument of construction accordingly falls before the decision in the *Appalachian* case. The view which the Court there took, and which we advance here, does not render the second sentence of Section 23 (b) meaningless; scope for its application can be found in waters which are obviously nonnavigable, but the flow of which nevertheless affects interests within the commerce power. Cf. *United States* v. *Appalachian Power Co.*, 311 U. S. at 399. The existence of such waters has been recognized by this Court since the *Appalachian* case. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523; cf. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.

We regard it as established, therefore, that navigability under the Act is coextensive with navigability as heretofore defined by the courts, and that the petitioners' challenge to this proposition is too unsubstantial to warrant consideration by this Court. The same may be said of the supplemental contention of the State of Wisconsin that even conceding our view of the law the Wisconsin

[15] As the Court pointed out (p. 408): "When once found to be navigable, a waterway remains so" (citing *Economy Light Co.* v. *United States*, 256 U. S. 113).

River at Tomahawk could not properly be held to be navigable. For convenience we set out in a footnote the evidence summarized by the court below as supporting the Commission's order.[16]

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[16] "The Wisconsin River has its source in Lac Vieux Desert, which lies partly in the State of Michigan and partly in the State of Wisconsin. It is 428 miles in length. It drops from an elevation of 1,652 feet at its source to 604 feet at its mouth, with an average fall of 2.45 feet per mile. It flows generally south to the city of Portage, Wisconsin, and then west for about 116 miles to its junction with the Mississippi River near Prairie du Chien.

* * * * *

"* * * there is evidence in the record that from 1835 to 1897 some three billion board feet of white pine was taken out of the State of Wisconsin down the Wisconsin River 'to market' on the Mississippi River from Dubuque, Iowa, to St. Louis, Missouri. This use of the river continued at a diminishing rate until 1915. During the period between 1858 and 1907 a large part of this lumber was logged above Tomahawk and taken down the river past the Corporation's dam. As far down as Merrill, some 28 miles below Tomahawk, the lumber was transported in loose logs driven downstream. The logs were cut into lumber at the mills at Merrill and other points on the river, and thence rafted down the Wisconsin and Mississippi Rivers to market in other States. The rafting from Merrill commenced about 1849, and until after the advent of the railroads, it was the only means of reaching a market.

"The log driving season began with the spring freshet in April and aggregated in the neighborhood of 150,000,000 board feet. If a drive was hung up for lack of water, the crew would wait for another freshet to finish the drive, the 'June freshets' being, in the language of one witness, 'as regular as the sun rises and sets,' and there were some drives in the Fall. The drives ended from 28 to 114 miles below Tomahawk. These freshets assured two rafting trips each year. The rafts were usually run to a fixed

This evidence is certainly no less persuasive than the evidence as to the New River in the *Appalachian* case, and as to the Susquehanna River in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 158–161 (App. D. C.), certiorari denied, 315 U. S. 806. Moreover, the *Appalachian* case arose by way of suit for injunction, and the United States explicitly waived in this Court the contention that the Commission's earlier finding as to navigability was entitled to the finality ordinarily accorded to a quasi-judicial determination by an administrative agency (see 311 U. S. at 402, note 7). The Court was free to make its own evaluation of the evidence, except insofar as it might have felt itself inhibited by the two-court rule (311 U. S. at 403–404). Here, the Commission's finding is directly in issue in a review proceeding under Sec-

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destination such as St. Louis, Missouri, Dubuque, Iowa, or Alton or Galena, Illinois.

"As early as 1857 there were 3,000 men engaged in the lumbering industry and the log stock exceeded $4,000,000 yearly in value. Timber owners engaged in the industry sold their logs before the drive started or when the logs reached the mills. The log driving crews were usually paid off when the logs were sold at the mill, but occasionally the same crew ran the rafts down to market where they were paid off. The sawmills obtained their funds for the purchase of the logs and the payment of operating expenses through advances obtained from the river dealer, payable when the rafts came down. Thus, the industry depended, for the funds its operations required, upon the transportation of the lumber to market on the Mississippi River and its sale there." (R. 645, 647–648.)

tion 313 (b) of the Act, and if supported by substantial evidence is conclusive upon the courts. *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 67. The court below has held that substantial evidence in the record does support the order, and there is no occasion for further review of that holding by this Court.[17] See *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130–131.

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[17] The State contends (Pet. 7) that the holding of the court below is in conflict with five cases, naming those which were briefly distinguished in the paragraph of that court's opinion beginning at R. 648 and concluding at R. 649. Reference to the facts of those cases, as cited by the court, will show that in each the contention that the waterway involved was a navigable water was supported merely by a showing of exceptional, occasional, sporadic, or trifling use for transportation, without commercial significance, as contrasted with the "long, regular and commercially successful use of the stream for the transportation of logs and rafts," which the lower court found established by the evidence in this case (R. 652). No attempt is made by the State to controvert the lower court's distinction of those cases.

CONCLUSION

The decision below is correct. There exist no conflicts. We respectfully submit, therefore, that the petitions for writs of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
Attorney.

CHARLES V. SHANNON,
General Counsel.
HOWARD E. WAHRENBROCK,
Assistant General Counsel,
Federal Power Commission.

JUNE 1945.

APPENDIX

The pertinent provisions of the Federal Power Act are as follows:

> SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
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> * * * * *
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> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.
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> * * * * *
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> SEC. 4. The Commission is hereby authorized and empowered—
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> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any

State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or

waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any

permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the

terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the

ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the

application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 31.18 of the Wisconsin Statutes, 1937 (the then current codification, with immaterial changes, of Chapter 380, Laws of Wisconsin, 1915), provides in part as follows:

> (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the [public service] commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing.
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>
> (3) Except when emergency shall require the same for the protection of life, health or property, no substantial alteration or addition shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the commission, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

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IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 1286

Wisconsin Public Service Corporation,
Petitioner,

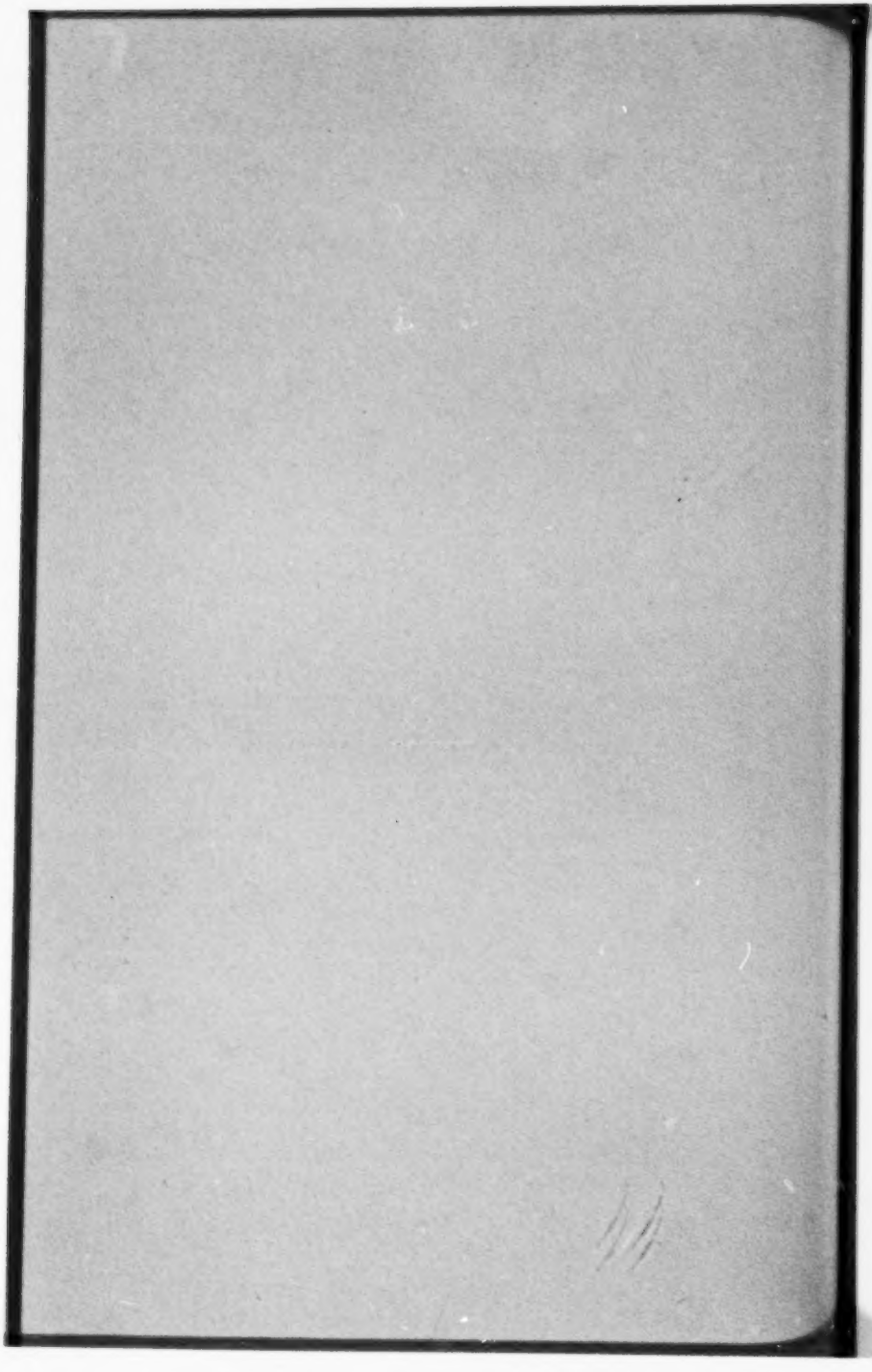
vs.

Federal Power Commission,
Respondent.

PETITIONER'S REPLY BRIEF

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD,
Of Counsel.



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Counsel for respondent argue that the definition of navigable waters in the Federal Power Act is the same as the definition of navigable waters in the constitutional sense. If that is so, then more than two-thirds of paragraph (8) of Section 3 of the Federal Power Act is wholly superfluous, as it would have been sufficient if the definition were limited

to the first thirty-one words thereof, which end with the words "several States".

It is not a reasonable assumption that the remainder of Section (8) was added by Congress with the intention that it should add nothing to its definition of navigable waters.

Counsel for the Commission assert that the finding to be made by the Commission with respect to the interests of interstate commerce is necessary only in connection with streams which are not navigable waters of the United States. —in other words, waters over which Congress has no jurisdiction under its power to regulate interstate commerce.

This construction is untenable, in view of the language of Section 23 (b) of the Act, which requires first of all that the stream involved be one "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States." Congress has such power only where the stream is a navigable water of the United States. If the stream involved were not such a stream, then Congress would have no jurisdiction whatever.

Subsequent to the Rivers and Harbors Acts of 1890 and of 1899 States as well as others were precluded from obstructing navigable waters without appropriate permission. The references to States, therefore, in Section 23 of the Federal Power Act is quite natural. Persons, corporations and States having federal authority granted subsequent to the enactment of the Rivers and Harbors Acts referred to, and persons and corporations having State permits issued prior thereto, are all exempted from the operation of the Act.

It was perfectly natural for the States to exercise jurisdiction over navigable waters until the United States en-

tered the field. Upon entering the field it was not the intention of Congress that dams constructed under State license (with at least the tacit approval of the United States evidenced by its failing to enter the field, *United States vs. Rio Grande Dam and Irrigation Company,* 174 U. S. 690, at 704) should thereupon become unlawful. In fact, both the Rivers and Harbors Acts of 1890 and of 1899 referred to contemplated that the States would continue to grant licenses (26 *Statutes* 426, 454; U.S.C.A., Title 33, Sec. 401).

Lake Shore & Michigan Southern Railway Company vs. Ohio, 165 U. S. 365, 368.

It is admitted by counsel for respondent that "authorized by law" under the Rivers and Harbors Act of 1890 meant authorized by State law, but it is asserted that because the federal government entered the field of regulation similar language should be given a different meaning. Inasmuch as the practice and right of States to grant permits are of such long standing and so well recognized, the language granting an exemption and protection for structures under prior permits should not be so lightly regarded, especially in view of the discussion in Congress on the subject.

In 1920 the dam in question was a lawful dam, having been constructed pursuant to a State grant in 1887. When the Water Power Act of Wisconsin was enacted in 1915 the dam did not become an unlawful structure, and at the time of the enactment of the Federal Water Power Act in 1920 the dam qualified as a lawful structure under a permit granted prior to its enactment, if the term "permit" as used therein includes a permit from a State granted prior to the enactment of the Rivers and Harbors Act of 1890. The fact

that Wisconsin saw fit to impose conditions upon the repair and rebuilding of the dam does not militate against the fact that Congress did not intend to interfere with structures which were lawful at the time the Federal Water Power Act was enacted.

Respectfully submitted,

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD
Of Counsel